there is an obvious omission which it is my duty to supply.

As with the learned Judge, in the case cited, I am bound to say, that had I read the will in draft, it would have leapt to the eye that there was an omission in respect of the testator's personal estate, i.e., in respect of (as we should say in Selangor) his movable property. That is not to say, however, that I am bound to provide words supplying the omission. In point of fact, I do not find it so by necessary implication that the testator desired to dispose of his personal estate at all. The reason I say that is that his personal estate, apart from a few cash balances in the bank and elsewhere which are of no great value, are entirely his share of the assets of the firm of Colomb & Co. of which he might have supposed (though erroneously) that he was not in a position to make a distribution by will. Many people in this country have entered into partnership arrangements of a vague kind often not committed to writing and are far from clear as to what happens in the event of the death of one of the partners or of they themselves. I have found that this confusion is widespread in this country. I do not know the facts and it may well be that there is a partnership agreement providing on a dissolution for a sale of the testator's interests in the firm or as the case may be. Whatever the facts may be, in this respect in the circumstances I cannot conclude as a matter of necessary implication that the testator had any intention at all of distributing his personal estate by will still less of providing that his adopted children should share in the distribution of such estate. That being so I answer the questions in the following way:

(1) In my opinion the position regarding the personal property of the testator is that it should be distributed as on an intestacy.

(2) The deceased having died domiciled in the State of Selangor, the distribution should be made in accordance with the Distribution Enactment; the adopted children are not entitled to succeed and the personal estate goes to the widow as to ½ and as to the remaining moiety, the surviving sister (Rosalind) and the deceased sister's children share equally according to their stocks.

Costs as taxed between solicitor and client to be paid out of the estate.

Order accordingly.

Solicitors: *Bannon & Bailey; S. Sothi.*

Re FOO CHEE HEI, An Infant; KOK SU-WIN (f) v. FOO LUM CHOON

[O.C.J. (Smith J.) March 15, 1958]

[K.L. — Originating Summons No. 194 of 1957]

Practice and Procedure — Guardianship of infants — Proceedings for custody of infants — Civil Procedure Code (Cap. 7), s.472 — Civil Law Ordinance, 1956, s.27 — "Law to be administered" — Meaning of — English R.S.C., O.55A r.2 (b).

By section 27 of the Civil Law Ordinance, the "law to be administered" in all cases relating to custody and control of infants shall be the law of England. There being no specific provision in the Civil Procedure Code regulating procedure for applications for custody, the expression "law to be administered" means the whole of the English substantial law and the procedure it prescribes by R.S.C., O.55a, r.2(b), and therefore the proceedings were properly commenced by Originating Summons.

Cases referred to:—

(1) *Re Powers*, 30 Ch.D. 291.

(2) *V. Solai v. Mariayee*, (1954) M.L.J. 256.

ORIGINATING SUMMONS.

B. K. Das for the plaintiff.

R. Ramani for the defendant.

Cur. Adv. Vult.

Smith J.: This is a summons taken out by the defendant for an order that this originating summons is not the proper procedure for appointing a guardian of an infant where disputed questions of fact depending on oral evidence have to be decided.

The present state of the proceedings is that the plaintiff has taken out an originating summons supported by her own extremely lengthy affidavit and by three affidavits of witnesses to certain of the incidents alleged by the plaintiff. The plaintiff goes into the marital life of herself and her husband, the respondent, in great detail over a number of years, sets out the circumstances in which she alleges the child was taken from her and generally attempts to shew that it is in the interest of the child that she should be his guardian.

The defendant has entered a conditional appearance and taken out a summons in chambers raising as one of its points for the Court's decision the point referred to in the first para

graph. (I make no comment as to whether it is yet permissible in these Courts to enter a conditional appearance: the point has not been taken before me).

The defendant's argument is that, while admitting that an originating summons may be an appropriate procedure for appointing a guardian when the facts are not in dispute it is quite inappropriate when the facts are disputed. It is essential in this present case not only that the Court should decide questions of fact concerning the home life of the child and his parents' domestic relations but also for the Court to receive evidence on the "religion and customs of the parties" — see Civil Law Ordinance, 1956, section 27. These matters, it is argued, are clearly such that they can be better laid before the Court by way of pleadings than jumbled up in a number of affidavits.

The defendant further argues that section 472, Civil Procedure Code clearly lays down that originating summons is not appropriate where there is an issue between the parties. That section reads:—

"Any application to the Court in its civil jurisdiction, not being between a plaintiff and defendant and not being in a pending suit or matter, shall ordinarily be made by way of originating summons, unless some other mode of procedure for such application is prescribed by written law."

The defendant argues that the words "not being between a plaintiff and defendant" mean 'not being between parties who are at issue on questions of fact'. In this case the terms of the plaintiff's affidavit indicate that there is an issue of fact between the parties, even though the defendant has not yet filed an affidavit in reply.

The defendant argues that no procedure has been prescribed by written law. Section 27 of the Civil Law Ordinance, 1956 reads as follows:

"In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Ordinance, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by any written law."

The defendant submits that the "law to be administered" means substantive law and not procedural law. No authority was given for this submission but it was urged that the Courts have always adopted this interpretation. Since no specific procedure is prescribed by our rules it is urged that we are thrown back on section 472 which tells us that since the parties are disputing a question of fact the proper way to begin this action is by plaint.

Mr. Ramani for the defendant illustrated his arguments by reference to various authorities including *Re Powers*[1] which is very clear authority for the general proposition that where there is only a dispute of law and not of fact summons is the appropriate method of disposal and is the authority quoted in *Odgers* on Pleading and Practice, 15th Edition, p. 349:—

"It will be apparent from this sketch of the procedure that it is primarily designed to deal with questions of law or discretion arising upon facts substantially not in dispute, and, indeed, where there is any choice in the matter, it is wrong to bring proceedings by originating summons if it is known that the facts are disputed. But sometimes the procedure is prescribed in cases where there may be very substantial disputes of fact, for example, in cases under the Inheritance (Family Provision) Act, 1938, where the question whether the testator has made reasonable provision for his dependants may be bitterly fought by those who inherit under his will. The evidence-in-chief is still given in such cases by affidavit, but upon the request of any opposite party the deponents will be ordered to attend for cross-examination, and the Master will adjourn the summons into Court to be heard with witnesses, and in this case (unless the oral evidence would not seriously add to the length of the hearing) will take its place in the Witness List."

Mr. Ramani also pointed out that even in England the commencement of proceedings under the Guardianship of Infants Acts by way of originating summons is permissive and not obligatory since the English O.55a, r.2(b) reads "An application...may be made...by an originating summons".

The plaintiff argued that under the Civil Law Ordinance, 1956 the expression "law to be administered" means the whole law of England, substantive and adjective, in so far as no provision has been made by local law. I must say that this argument appeals to me. Since we adopt the substantive law of England it appears to me to be sensible to adopt the English practice at the same time. In this case we are able to adopt it without difficulty since we also have provision for originating summonses. Further, the English procedural law which it is sought to apply in this case is not the general procedure of the English courts but a specific procedure laid down under an English statute which our written law tells us to apply: in applying that English statute it seems to me that we must apply the whole of its substantive law and the procedure which it prescribes.

I am satisfied, therefore, that in the narrow context of section 27 of the Civil Law Ordinance, 1956 the expression "law to be administered" means the whole of the English law on the subject and includes procedure provided express-

ly therefor with such necessary modifications as may be necessary to suit the general practice of this Court. (In this case no modification appears to be necessary since the procedure of the English Courts is broadly possible here). It is not necessary for me to rule on the meaning of the words "not being between a plaintiff and defendant" in section 472, Civil Procedure Code.

In coming to this conclusion I am fortified by the practice of the Courts in the former Federated Malay States. Up to 1937 proceedings to appoint guardians appear to have been commenced by plaint. After the enactment of the F.M.S. Civil Law Enactment in 1937 the practice was normally to commence proceedings even in disputed cases by way of originating summons. The question of the correct procedure was considered by the Courts in *V. Solai v. Mariayee*[2] in which Bellamy, J., who did not have the benefit of argument by counsel, ruled that no suit will lie for the custody of an infant and that the proper procedure, where there is no action or other proceeding pending, is for an application to be made by originating summons in the matter of the infant. This case was referred to in argument before Wilson, J. in C.S. 675/53 when application was made by the defendant to strike out a suit for custody. Wilson, J., without giving reasons, dismissed the application: he did not record his reasons and was not asked for them. Nevertheless he did not strike out the suit. It would seem that Wilson J. considered that a suit could be entertained.

With respect to the opinion of Bellamy, J. I am not prepared to go with him so far as to say as he does that, "It (the English O.55a) does not appear to admit of any such proceeding (i.e. for the custody of a child) being taken by a suit". I agree with Mr. Ramani that the provisions of O.55a, r.2(b) are permissive and not exclusive. I consider that even in England the proceedings could be begun by action though a successful plaintiff might well find that he did not get all his costs.

From the cases cited to me by Mr. B. K. Das for the plaintiff it appears that the English (and Canadian) practice is usually to begin by originating summons even in complicated cases and that the procedure is as set out in *Odgers* on Pleading and Practice *op cit* page 349.

The question now arises whether on the facts of this case as they now appear there is any justification for holding that this case ought to be decided by way of action. On this case as it now stands I cannot see that the issues are likely to be any more difficult than they were in some of the English cases. It may be that before the end of the case it will be apparent that this case could have been more expeditiously disposed of by way of suit in which case the Court may be able to give practical expression to its opinion through the medium of costs. It is possible that at any stage of these proceedings it is open to the Court if the proceedings became unmanageable to adjourn this originating summons until an action has been brought and decided. That is a matter which can be better considered and discussed if and when the plaintiff's affidavits have been replied to.

Speaking for myself I have so far experienced no difficulty in dealing even with disputed cases in the manner described by *Odgers* though admittedly no cases of considerable complexity have been before me.

While agreeing with Mr. Ramani that the procedure for originating summonses does not provide for such useful procedures as pleadings and discovery nevertheless, as Mr. Das said, the Court has an inherent jurisdiction to give any necessary directions. The important matter is that justice be done speedily: I cannot at this stage in a proceeding which has so far followed the normal practice of the Courts see that a just decision will be more speedily reached by quashing the present proceedings and obliging the plaintiff to start all over again.

The application is dismissed.

I will now hear any argument with regard to costs and orders consequential upon my ruling.

Application dismissed.

Solicitors: *Das & Co.; Braddell & Ramani.*

CHOO TIONG HIN & ORS. v. CHOO HOCK SWEE

[C.A. (Whyatt C.J., Wee Chong Jin and Chua JJ.) July 11, 1958]

[Singapore — Civil Appeal No. 30 of 1957]

Family arrangement — Mutual agreement between father and adoptive children to work family farm and business enterprises — Whether enforceable — Contract.

Practice — Court of Appeal — Finding of fact by trial Judge.

The plaintiff (respondent) and his first wife, then poor, went to live in a house and farm in Singapore in about 1916. In the course of time, two daughters were born and five sons adopted, and most of the family (including all the adopted sons and numerous grand